

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 27 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

In re the Marriage of:	)	
	)	
CATHERINE ANN RODRIGUEZ,	)	2 CA-CV 2007-0113
	)	DEPARTMENT B
Petitioner/Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
and	)	Not for Publication
	)	Rule 28, Rules of Civil
RICHARD RAYMOND RODRIGUEZ,	)	Appellate Procedure
	)	
Respondent/Appellee.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20042656

Honorable Deborah Ward, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Catherine Rodriguez (“Mother”) challenges the trial court’s jurisdiction to modify, at an expedited visitation-enforcement hearing initiated by appellee Richard Rodriguez (“Father”), the child custody portion of the decree dissolving the parties’ marriage. Mother claims that, by awarding Father temporary custody of the children at this hearing, the trial court violated her rights to substantive and procedural due process. She also attacks the trial court’s subsequent order modifying legal custody pursuant to the parents’ own custody agreement and argues a term within that agreement is invalid. We affirm for the reasons set forth below.

### **Factual and Procedural Background**

¶2 The Rodriguezes are the parents of three children together. When their marriage was dissolved, their daughter was turning three years old, and their twins—a boy and a girl—were fourteen months old. In light of the father’s history of violence and drug use, the trial court entered a decree of dissolution awarding Mother custody of the children and granting Father supervised visitation.

¶3 Approximately one year after the decree was entered, Father filed a petition to modify his parenting time and a request to enforce visitation after Mother had obtained an order of protection against him. The court ordered that Father have supervised parenting time each Sunday for two to three hours. At a continued enforcement hearing held several months later, Father acknowledged his past criminal record but advised the court he had successfully completed a drug treatment program and would pay for the cost of supervised

parenting time. The court then ordered the parties to participate in the Judicial Supervision Program (JSP).

¶4 Shortly before the first JSP review hearing was scheduled to take place, Mother notified the court that Child Protective Services (CPS) was investigating Father for allegedly having touched their older daughter inappropriately. The trial court questioned representatives from JSP and CPS at the review hearing, then, apparently finding the abuse claim unfounded, increased Father's supervised parenting time to four hours each Sunday. The court later permitted Father to have supervised visits with his children away from the JSP facility. In late 2006, the trial court ordered that only the exchange of the children be supervised at the JSP facility, and it extended Father's parenting time to eight hours each Sunday.

¶5 Mother stopped these supervised exchanges after two weeks, claiming the same daughter had made another report of sexual abuse. At the next JSP review hearing, the trial court found "there [was] a pattern of unsubstantiated claims made to Child Protective Services . . . by [Mother]." The trial court warned Mother that if she made further allegations of child abuse against Father, she would have to provide witnesses to testify before the court and, "[i]f the allegations [were] found to be unsubstantiated after a hearing and . . . the [mother] fail[ed] to comply with the Court[']s Order, the Court w[ould] not hesitate to change custody of the children."

¶6 Mother took the two daughters to the emergency room the following day. They were both diagnosed as suspected victims of sexual assault, and the matter was

reported to CPS. Father then filed another request to enforce visitation, alleging Mother had reported him to CPS again and had not brought the children to supervised exchanges.

¶7 The trial court held an expedited visitation-enforcement hearing on December 22, 2006. After questioning CPS about the alleged abuse and reviewing documents Mother presented as evidence, the trial court appeared to find Mother in contempt of its standing orders. Given Mother’s pattern of making unsubstantiated claims of sexual abuse, the court also found that the irrationality and emotional instability exhibited by Mother in resisting even supervised visits by Father impaired her ability to make parenting decisions and negatively affected her children. Noting their young ages—then five and three years old—and particular susceptibility to manipulation, the court found “there will be irreparable physical and emotional harm done to the minor children if custody is not changed forthwith.” For these reasons, the trial court found “it is in the best interest of the minor children that the Court *sua sponte* enter a temporary order to change custody of the minor children to [Father] until the Court can have a more thorough investigation and custody evaluation completed.” The court granted Mother supervised visitation and ordered the parties to participate in a custody evaluation conducted by the Family Center of the Conciliation Court (FCCC).

¶8 Mother filed two petitions for special action seeking relief from the temporary custody order, and this court declined to accept jurisdiction of both. *See Rodriguez v. Rodriguez*, No. 2 CA-SA 2006-0109 (order filed Jan. 17, 2007); *Rodriguez v. Rodriguez*, No. 2 CA-SA 2007-0008 (order filed Feb. 28, 2007). As those petitions were pending, the

trial court affirmed its temporary custody order and increased the amount of Mother's supervised parenting time. Shortly thereafter, the court terminated the requirement that her parenting time be supervised and issued new orders governing parenting time.

¶9 In May 2007, the FCCC informed the trial court that the parents had completed a Memorandum of Understanding during their court-ordered evaluation. In that document, the Rodriguezes agreed to joint legal custody of the children, stating it was in the children's best interests. The children would reside with Mother except for every other weekend, when they would reside with Father. The agreement expressly provided that the parents "were not coerced into making this agreement." The agreement further provided: "We agree . . . that should we be unable to agree after consulting with each other on major decisions concerning the children, the maternal grandparents will have the final decision-making responsibility." The agreement was signed by both parents, endorsed by the FCCC as being in the children's best interests, and submitted to the trial court for its approval.

¶10 At a review hearing on May 21, 2007, counsel for Mother informed the court that the parties had only intended their agreement to be temporary. After reviewing the agreement and questioning Father and Mother, the court found the custody agreement was not temporary. The court noted there had been "no indication during the course of the hearing from either party that they disagreed with the terms of the Memorandum of Understanding," which the trial court found to be complete as to all issues. The court further observed Mother had "indicated . . . that the agreement was working, that it was in the best interest[s] of the[] children, the parties were getting along quite well, and the

agreement seemed logistically possible.” The court approved the parents’ Memorandum of Understanding and ordered their custody decree modified to incorporate the agreement’s terms. This appeal followed.

## **Discussion**

### **Temporary Custody Order**

¶11 Mother first argues the trial court lacked jurisdiction to change custody temporarily at the expedited visitation-enforcement hearing “without any pleading pending which request[ed] such a change.” Specifically, she contends none of the statutes the court relied upon in making its order—A.R.S. §§ 25-414, 25-403, or 25-411—authorized it to modify a custody decree sua sponte. She further claims the court’s actions denied her substantive and procedural due process. We do not reach these issues, however, because the parties’ subsequent custody agreement has rendered them moot.

¶12 Following a policy of judicial restraint, the Court of Appeals typically does not address moot issues. *Lana A. v. Woodburn*, 211 Ariz. 62, ¶ 9, 116 P.3d 1222, 1225 (App. 2005). The issue of whether a trial court had jurisdiction to enter an earlier custody order is moot when the parties participate in later proceedings that result in the entry of a valid order establishing custody. *See Smith v. Smith*, 117 Ariz. 249, 251, 571 P.2d 1045, 1047 (App. 1977). A challenge to an order that is fully executed and cannot be affected on appeal is also moot. *See Application of Perez*, 71 Ariz. 352, 352-53, 227 P.2d 385, 385 (1951); *see also DePasquale v. Superior Court*, 181 Ariz. 333, 336-37, 890 P.2d 628,

631-32 (App. 1995) (noting lack of remedy for erroneous transfer of temporary custody given changed circumstances).

¶13 We agree with the trial court’s finding here that the parties’ custody agreement, once ratified, made “any previous orders entered by [the trial court] moot.” *See* Ariz. R. Fam. Law P. 47(M) (“Temporary orders become ineffective and unenforceable . . . following entry of a final . . . order . . .”). In short, we cannot grant relief from the temporary custody order because that order is no longer in force. And we decline to vacate the parties’ own custody agreement because, for the reasons discussed below, we find the court had jurisdiction to approve its terms and enter it as an order.<sup>1</sup>

#### Custody Agreement

¶14 Mother also argues “[t]he trial court lacked jurisdiction and abused its discretion in changing legal custody [pursuant to the parents’ Memorandum of Understanding] without a trial and without making the statutorily required findings” regarding the children’s best interests. In addition, she challenges a term in the custody order giving her parents—the children’s grandparents—the authority to make final decisions in the event Mother and Father are unable to agree on issues affecting the children. We address these arguments in turn.

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<sup>1</sup>We will on occasion consider moot questions if the legal issues presented are important to the public or capable of recurring and evading review. *Slade v. Schneider*, 212 Ariz. 176, ¶ 15, 129 P.3d 465, 468 (App. 2006). However, we do not find this particular case an appropriate context to address Mother’s claim that she was penalized for making good-faith reports of suspected child abuse. Father has not submitted an answering brief, and the record of proceedings is incomplete.

¶15 We review de novo jurisdictional challenges to an order modifying child custody. *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 6, 9 P.3d 329, 332 (App. 2000). Mother claims the trial court lacked jurisdiction to modify custody pursuant to the parties' Memorandum of Understanding because "there still was no pleading requesting such relief." We disagree. "[A] trial court is vested with subject matter jurisdiction over domestic relations matters, including child custody determinations . . . [a]nd . . . has continuing jurisdiction to modify a custody decree it has entered." *Id.* ¶ 7 (citations omitted). We have previously held that § 25-411, which requires parties seeking modification of custody to do so by petition or motion, is procedural rather than jurisdictional. *Dorman*, 198 Ariz. 298, ¶ 9, 9 P.3d at 333. Hence, a petition to modify custody is not a jurisdictional prerequisite to a valid modification order. *Id.*; *Lowther v. Hooker*, 129 Ariz. 461, 464, 632 P.2d 271, 274 (App. 1981).

¶16 As long as there are changed circumstances affecting a child's welfare, the court has jurisdiction to change the terms of a custody order. *Ward v. Ward*, 88 Ariz. 130, 134-35, 353 P.2d 895, 898 (1960); *Cone v. Righetti*, 73 Ariz. 271, 275, 240 P.2d 541, 543-44 (1952). Here, the reports of child abuse and the resulting interruptions in court-ordered visitation were post-decree developments that affected the children's welfare. The trial court therefore had jurisdiction to address that situation and modify the terms of the prior decree as well as order shared custody of the children in conformity with the Rodriguezes' agreement.

¶17 We will not disturb a trial court’s order modifying custody absent a clear abuse of discretion—that is, “a clear absence of evidence to support its actions.” *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982). The trial court was not required to hold a trial or make findings on the record before approving the parents’ custody agreement, but the court has an obligation to ensure that any custody arrangements are in the children’s best interests. *See* § 25-403(A); *Canty v. Canty*, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994) (public policy requires trial court to review modification agreement to confirm it is in best interests of children); *see also DePasquale*, 181 Ariz. at 336, 890 P.2d at 631 (trial court must exercise independent judgment in determining best interests). For that reason, the court is not bound to approve custody agreements reached by parents. *Canty*, 178 Ariz. at 447, 874 P.2d at 1004.

¶18 Nevertheless, such agreements generally will be accepted. *See id.* And insofar as these agreements are made voluntarily and appear to be in the children’s best interests, a trial court is not required to make explicit findings to this effect before modifying custody. *See* § 25-403(B) (explicit findings on children’s best interests required only if custody contested); *see also Lowther*, 129 Ariz. at 462, 464, 632 P.2d at 272, 274 (reinstating custody modification entered upon parents’ stipulation and without explicit findings regarding children’s best interests). As we explained in *Lowther*:

[A stipulated] modification order is akin to a consent judgment. In the absence of fraud, mistake, or collusion, a judgment by consent is binding and conclusive upon the parties to the same extent as a judgment rendered upon controverted facts and due consideration thereof upon a contested trial.

*Id.* at 463-64, 632 P.2d at 273-74.

¶19 In the Memorandum of Understanding, Mother and Father agreed to share joint legal custody of the children and stated they had “no areas of disagreement.” Pursuant to that agreement, Mother acts as the children’s primary custodian, and Father receives parenting time with the children every other weekend. Both the Rodriguezes’ custody agreement and the FCCC report stated this arrangement was in the children’s best interests, an assessment the trial court implicitly accepted. Mother has never alleged the agreement is contrary to the children’s interests. Indeed, at the time of the hearing, she stated it was working well and had proven feasible. Because the record reflects that the parents’ agreement was in the children’s best interests, the trial court did not abuse its discretion in modifying the custody order to adopt its terms. *See Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3.<sup>2</sup>

¶20 Finally, Mother asserts the trial court “lacked jurisdiction” to adopt the portion of the agreement giving her parents the authority to resolve stalemates concerning the children. She has cited no authority to support her claim that, by including this term in its modification order, the trial court exceeded its jurisdiction. For this reason alone, we need not address the issue. *See Ariz. R. Civ. App. P. 13(a)(6)* (brief must contain argument

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<sup>2</sup>The court also found the parents entered into their agreement without duress, and Mother has not alleged it was the product of fraud or collusion. To the extent she suggests the modification order arose by mistake because she understood the agreement to be only temporary, she has failed to develop this argument on appeal. *See Ariz. R. Civ. App. P. 13(a)(6)* (brief shall contain argument and citation to authority for each issue presented). Therefore, we do not address it.

and citation to authority for each issue presented). Moreover, because Mother agreed to this specific provision and did not object to the court's order on this ground below, she has waived review of it on appeal. *See Banales v. Smith*, 200 Ariz. 419, ¶ 8, 26 P.3d 1190, 1191 (App. 2001); *Pearson v. Pearson*, 190 Ariz. 231, 234, 946 P.2d 1291, 1294 (App. 1997). In any event, we are skeptical that this portion of the order could violate Mother's "fundamental right . . . to make decisions concerning the care, custody, and control of [her] children," *see Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion), when she herself negotiated its inclusion in the Memorandum of Understanding and told the court that the agreement including this provision was working well. Indeed, the court showed deference to the Rodriguezes' parental rights by incorporating into its order the terms they had negotiated. We hold the trial court had continuing jurisdiction to adopt the Rodriguezes' custody agreement into its order and did not violate the parents' constitutional rights by doing so.

### **Conclusion**

¶21 For the foregoing reasons, we affirm the trial court's order dated May 21, 2007, modifying the Rodriguezes' custody decree pursuant to their written agreement.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge